

FILED BY CLERK

DEC -7 2007

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,

Appellee,

v.

RICHARD MATHIEU SALMOND,

Appellant.

)
)
) 2 CA-CR 2006-0198
) DEPARTMENT A
)

MEMORANDUM DECISION

)
) Not for Publication
) Rule 111, Rules of
) the Supreme Court
)
)

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20052972

Honorable Charles S. Sabalos, Judge

VACATED

Terry Goddard, Arizona Attorney General
By Randall M. Howe and Kathryn A. Damstra

Tucson
Attorneys for Appellee

Robert J. Hooker, Pima County Public Defender
By M. Edith Cunningham

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H O W A R D, Presiding Judge.

¶1 After a jury trial, appellant Richard Salmond was convicted of one count of criminal trespass. The trial court sentenced him to a mitigated, enhanced prison term of one year. On appeal, he argues that there was insufficient evidence to support his conviction and that the trial court improperly instructed the jury that first-degree criminal trespass is a lesser-included offense of second-degree burglary. The state concedes that the court committed fundamental, prejudicial error in giving the lesser-included-offense instruction. We accept the state’s concession and vacate Salmond’s conviction and sentence.¹

¶2 Although Salmond objected to the lesser-included-offense instruction below, he did so on the basis that he had relied to his detriment on the prosecutor’s promise not to request such an instruction. As he concedes, he did not argue that criminal trespass was not a lesser-included offense of burglary. Accordingly, he has forfeited appellate review of this issue absent fundamental error. *See* Ariz. R. Crim. P. 21.3(c) (party objecting to jury instruction must “stat[e] distinctly the matter to which the party objects and the grounds of his or her objection”); *State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005) (fundamental error review applies when defendant fails to object below). Fundamental error is “error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial.” *Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607, *quoting State*

¹Because we vacate his conviction and sentence on this ground, and Salmond has already served the sentence, we do not address Salmond’s argument concerning the sufficiency of the evidence.

v. Hunter, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984). “To prevail under this standard of review, a defendant must establish both that fundamental error exists and that the error in his case caused him prejudice.” *Id.* ¶ 20.

¶3 We review de novo whether one crime is a lesser-included offense of another. *See In re James P.*, 214 Ariz. 420, ¶ 12, 153 P.3d 1049, 1052 (App. 2007). A crime is a lesser-included offense of another “(1) if the included offense, by its very nature, is always a constituent part of the major offense charged; or (2) if the terms of the charging document describe the lesser offense even though the lesser offense does not always make up a constituent part of the major offense charged.” *State v. Ennis*, 142 Ariz. 311, 314, 689 P.2d 570, 573 (App. 1984). The instruction here was not proper under the first test because criminal trespass contains an element that burglary does not—knowledge that one’s entry or presence is unlawful. *State v. Malloy*, 131 Ariz. 125, 130-31, 639 P.2d 315, 320-21 (1981). Therefore, it “is not necessarily a lesser included offense of burglary.” *Id.* at 131, 639 P.2d at 321; *see also State v. Kozan*, 146 Ariz. 427, 429, 706 P.2d 753, 755 (App. 1985) (change in statutory definition of “knowingly” did not affect reasoning in *Malloy*).

¶4 Nor was the instruction proper under the second test. The indictment alleged that Salmond had “committed burglary in the second degree of a residential structure, belonging to or occupied by [the victim].” It did not include an allegation that Salmond knew his entry or presence was unlawful. *See Ennis*, 142 Ariz. at 314, 689 P.2d at 573 (criminal trespass not lesser-included offense of burglary under second test because charging

document “d[id] not specifically include the element of knowingly entering or remaining unlawfully”). Because the lesser-included-offense instruction was improper, the trial court erred by giving it.

¶5 Additionally, we accept the state’s concession that this error was both fundamental and prejudicial. In *State v. Branch*, 108 Ariz. 351, 354-55, 498 P.2d 218, 221-22 (1972), the trial court improperly gave a lesser-included-offense instruction, and the jury convicted the defendant of that offense. Our supreme court held, on due process grounds, that this procedure constituted fundamental error. *Id.* And this court has found fundamental error when, based on an improper lesser-included-offense instruction, a defendant was acquitted of the charged offense but convicted of the “lesser” offense. *State v. Gutierrez*, 116 Ariz. 207, 208-09, 568 P.2d 1105, 1106-07 (App. 1977).

¶6 That is what happened here. Salmond was acquitted of burglary but convicted of criminal trespass, an offense not included within burglary. Thus, under *Branch* and *Gutierrez*, and as the state concedes, the error was fundamental. And absent the erroneous criminal-trespass instruction, Salmond would not have been convicted at all. Accordingly, the trial court’s fundamental error prejudiced Salmond.

¶7 For the foregoing reasons, we vacate Salmond’s conviction and sentence. Salmond asserts that his sentence in another case, CR-20055116, was enhanced based on the conviction we have now vacated, and he asks that we remand for resentencing in CR-20055116. We have no authority to do so. Salmond appeals here from the conviction and

sentence in CR-20052972, and the record before us involves only that case. We will not consider matters outside the record. *See State v. Sainers*, 196 Ariz. 20, ¶ 7, 992 P.2d 612, 614 (App. 1999). Additionally, we “may reverse, affirm or modify the judgment appealed from,” A.R.S. § 13-4036, but we may not change the result in other cases. Therefore, we do not address here any issue involving CR-20055116.

JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

JOHN PELANDER, Chief Judge

J. WILLIAM BRAMMER, JR., Judge